

2003

Linda R. Acosta v. Salt Lake Regional Medical Center and/or Liberty Mutual Insurance Co., and, the Utah Labor Commission : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS

LINDA R. ACOSTA, :
Petitioner/Appellant, : Court of Appeals
vs. : Case No.: 20030907-CA
: Priority 7
SALT LAKE REGIONAL MEDICAL CENTER and/or LIBERTY
MUTUAL INSURANCE CO.; and, :
THE UTAH LABOR COMMISSION : Labor Commission No..
: 2002958 and 2002959
Respondents/Appellees.

2

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and/or LIBERTY MUTUAL INSURANCE COMPANY

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**RESPONDENT REQUESTS ORAL ARGUMENT AND THAT THIS CASE
BE REPORTED**

FILED
UTAH APPELLATE COURT

MAR 04 2004

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JURISDICTION OF THE UTAH COURT OF APPEALS

Petitioner, Linda Acosta, files this Petition for Review from an order of the Utah Labor Commission, dated October 23, 2003. This Court has jurisdiction over this appeal pursuant to Utah Code Annotated §§ 34A-2-801(8)(a), 63-46b-16, and 78-2a-3(2)(a).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Issue: Whether the Labor Commission correctly dismissed Ms. Acosta's occupational disease claim under the claim preclusion branch of the doctrine of res judicata where Ms. Acosta had previously litigated her claim and appealed all the way to the Utah Supreme Court?

Standard: The Court of Appeals' determination of whether res judicata bars an action presents a question of law, reviewed for correctness. See Macris & Assoc. v. Neways, 2000 UT 93, ¶ 17, 16 P.3d 1214.

DETERMINATIVE LAW

The Utah Supreme Court has discussed the requirements for the application of claim preclusion as follows:

{19} The doctrine of res judicata embraces two distinct branches: claim preclusion and issue preclusion. Claim preclusion involves the same parties or their privies and also the same cause of action, “and this precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action.” . . .

{20} In order for claim preclusion to bar a subsequent cause of action, a plaintiff must satisfy three requirements:

First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Macris & Assoc. v. Neways, Inc., 2000 UT 93, ¶¶19, 20, 16 P.3d 1214. The Court of Appeals recently issued decisions on this point as well. See Youren v. Tintic School Dist., 2004 UT App 33; and H.C. Massey v. Board of Trustees of the Ogden Area Community Action Committee, 2004 UT App 27.

STATEMENT OF THE CASE

On March 26, 1999, Ms. Acosta filed an Application for Hearing for an industrial injury claim she alleged occurred at Salt Lake Regional Hospital on December 20, 1998. In this application, she alleged that she was lifting a baby out of a crib and suffered a low back injury. This Application for Hearing, filed through her then counsel, Timothy Allen, claimed entitlement to recommended medical care and temporary total disability compensation (i.e., indemnity compensation). This litigation is known as Labor Commission case number 99301 (hereinafter “the first action”). See R. at 85.

A formal hearing on the first action was held on September 1, 1999 before Administrative Law Judge Donald L. George (the “ALJ”) at the Utah Labor Commission.

On October 22, 1999, the ALJ entered his Findings of Fact, Conclusions of Law and Order, awarding workers’ compensation benefits. The ALJ’s award was based, at least in part, on a cumulative trauma theory.

Respondents timely filed a Motion for Review with the Labor Commission on November 17, 1999. On January 31, 2000, the Commission issued its Order Granting Respondents’ Motion for Review,

reversing the ALJ's award of workers' compensation benefits to Ms. Acosta. Ms. Acosta filed a Petition for Review of this Order with the Court of Appeals on February 29, 2000. The Court of Appeals ruled in Respondents' favor, holding that Ms. Acosta was not entitled to receive workers' compensation benefits from this episode since she had an asymptomatic preexisting condition and that such a condition required her to meet the higher legal causation standard of Allen v. Industrial Commission. See Acosta v. Labor Commission, 2002 UT App 67, 44 P.3d 819. The Utah Supreme Court denied her request for certiorari. See Acosta v. Labor Commission, 48 P.3d 979 (Utah 2002).

Thereafter, on August 27, 2002, through new legal counsel, Richard Burke, Ms. Acosta filed two additional Applications for Hearing with the Labor Commission. As with her First Application, Ms. Acosta again sought medical expenses and disability compensation from Respondents based upon the identical low back condition. In one application, Ms. Acosta alleged an industrial accident claim, attributing her low back pain to "cumulative work trauma" as a result of working on December 20, 1998. This case is known as Labor Commission Case No. 2002958. See R. at 2 (the "cumulative trauma claim"). Ms. Acosta has voluntarily withdrawn this claim. In the other application, she alleged an "occupational disease claim"

for her back problems which she says occurred from approximately December 1980 to December 20, 1998 while working at Salt Lake Regional Hospital. See R. at 25 (the “occupational disease claim”).

On October 1, 2002, Respondents filed a Motion to Dismiss the cumulative trauma and occupational disease applications based upon the doctrine of res judicata and the applicable 180-day statute of limitation for giving notice to one’s employer. See R. at 52. The Administrative Law Judge granted the Motion to Dismiss, entering her Order on Motion to Dismiss on April 18, 2003. See R. at 103. The ALJ agreed that these additional applications were barred by the doctrine of res judicata. The ALJ did not address the notice argument, the issue of res judicata being determinative.

On May 19, 2003, Ms. Acosta filed a Motion for Review of the Order. See R. at 110-23. Respondents filed a Reply to Motion for Review on or about June 9, 2003. See R. at 124-37.

The Labor Commission entered its Order Denying Review on October 23, 2003 (the “Commission’s Order”). See R. at 139-43. Ms. Acosta subsequently filed a Petition for Review on November 11, 2003 and a timely Docketing Statement thereafter. See R. at 144-45.

STATEMENT OF FACTS

The facts in this case are not disputed. The relevant facts are as follows:

Ms. Linda Acosta is a licensed practical nurse who has worked for Salt Lake Regional Medical Center in its maternal infant division from December 1980 through December 20, 1998. See Acosta, 2002 UT App 67 at ¶ 2. On December 20, 1998, Ms. Acosta was assigned to take a rolling crib, which came to her breast bone, from the nursery to a patient's room. On arrival in the patient's room, Ms. Acosta reached down into the crib, picked up the eight-pound infant, turned, and handed the infant to its mother. As she performed this task, Ms. Acosta claims she felt a twinge in her back. Shortly thereafter, she went to lunch. After lunch, she claims that she had difficulty standing up and walking. Upon learning of this development, a supervisor sent her to the emergency room. Over time, Ms. Acosta's pain grew worse. She was diagnosed with significant degenerative changes in her spine, including severe spinal stenosis. She ultimately had spinal surgery performed at L4-5 by Dr. Robert Hood.

Ms. Acosta subsequently filed a workers' compensation claim with Respondents seeking indemnity and medical benefits arising from this alleged industrial accident. Respondents denied Ms. Acosta's claim. She

then filed her claim with the Utah Labor Commission by way of an Application for Hearing. The Application for Hearing for her first action provides:

The accident occurred as follows: I was lifting a baby out of an isolet (sic) to hand to its mother.

The injuries I sustained are: LB pain w/ Ruptured L4-5 disk?

Benefits claimed: Temporary total disability
Recommended medical care

See R. at 85.

The ALJ correctly recognized that under Utah law there are two legal causation standards applicable to industrial injury claims: (1) a lower, more lenient standard applicable to injuries where a claimant does not have a preexisting condition; and, (2) a higher, more stringent standard applicable when a claimant has a preexisting condition. However, the ALJ concluded that the more stringent legal causation standard would not apply in this instance despite Ms. Acosta's admitted preexisting back condition. As such, the ALJ awarded Ms. Acosta workers' compensation benefits under section 34A-2-401 of the Utah Code. The ALJ's ruling also indicated that benefits were awardable to Ms. Acosta under the higher legal causation standard based upon a cumulative trauma theory, although this theory was never raised by Ms. Acosta.

The Labor Commission subsequently reversed the ALJ's decision to award Ms. Acosta workers' compensation benefits. Like the ALJ, the Commission recognized the two possible legal causation standards articulated in Allen. However, the Commission concluded that the more stringent legal causation standard applied because Ms. Acosta had a preexisting back condition at the time of her injury. Ultimately, the Commission ruled that Ms. Acosta had not satisfied the higher legal causation standard and, therefore, denied Ms. Acosta workers' compensation benefits. The Commission also ruled that the ALJ erred in raising a *sua sponte* claim of cumulative trauma. This matter was appealed to the Utah Court of Appeals which issued a decision on March 7, 2002 affirming the Labor Commission's ruling that the higher legal causation standard applied to asymptomatic pre-existing conditions and, therefore, ultimately found that a one-time lift did not meet the higher legal causation standard since it did not amount to an unusual or extraordinary exertion when compared with 20th century non-employment life. See Acosta, 2002 UT App 67. The Court of Appeals also agreed that the ALJ erred in *sua sponte* raising the cumulative trauma claim. Ms. Acosta's Petition for Certiorari was denied.

On August 27, 2002 Ms. Acosta filed two new Applications for Hearing

again seeking workers' compensation benefits based upon the same events alleged in her first action. This time, however, she raised different legal theories of relief. One of the applications recast the claim under a theory of repetitive injury from cumulative trauma, compensable under the Workers' Compensation Act, section 34A-2-101 et seq. The cumulative trauma claim provides:

The accident occurred as follows: lifting babies, assisting patients with activities of daily living, picking up items from the floor and other activities

The injuries I sustained are: low back

Benefits claimed: medical expenses, recommended medical care, temporary total compensation, temporary partial compensation, permanent partial compensation, travel expenses, interest.

See R. at 2.

The other application recast the claim as an occupational disease claim based upon gradual injury, compensable under the Utah Occupational Disease Act, Section 34A-3-101 et seq. The occupational disease claim provides:

The accident occurred as follows: lifting babies, assisting patients with activities of daily living, picking up items from the floor and other activities

The injuries I sustained are: low back

Benefits claimed: medical expenses, recommended medical care, temporary total compensation, temporary partial compensation, permanent partial compensation, travel expenses, interest.

See R. at 25.

Respondents filed a Motion to Dismiss the cumulative trauma and occupational disease claims under the doctrines of res judicata and failure to comply with the applicable 180-day notice requirements of 34A-2-407 and 34A-3-108 (1998). See R. at 52-64. The ALJ granted Respondents' Motion to Dismiss. The cases were consolidated and were appealed from the ALJ to the Commission.

The Commission evaluated whether these new applications were barred under the doctrine of res judicata. The Commission entered its Order Denying Motion for Review on October 23, 2003, pointing out that the gravamen of the new claims was that Ms. Acosta injured her back over time as a result of work-related activities at Salt Lake Regional, which back injury first became acute on December 20, 1998, when she lifted an infant from its crib. See R. at 60-62. Ultimately, the Commission concluded that Ms. Acosta's subsequent filings were barred under this doctrine. Ms. Acosta's appeal takes issue with the Commission's evaluation of the res

judicata doctrine to her occupational disease claim under the facts presented here.

SUMMARY OF THE ARGUMENT

The primary issue in this case is whether the Commission erred in ruling that Ms. Acosta's occupational disease claim is barred by the doctrine of res judicata. Respondents agree with the Commission that the elements necessary to invoke this defense apply. The occupational disease claim involves the same parties. Moreover, the first action resulted in a final judgment on the merits. Most significantly, the theories raised in the subsequent action, although not presented in the first action, involve the same claim, and constitute a claim that could have and should have been raised in the first action. This Court should affirm the evaluation and analysis of the Commission in this case.

In the event that this Court finds the doctrine of res judicata inapplicable, the Ms. Acosta's occupational disease claim is still barred by the notice provisions of section 34A-2-407 and 34A-3-108, U.C.A.. Under this circumstance, remand to the Commission would be the appropriate remedy.

ARGUMENT

THE DOCTRINE OF RES JUDICATA BARS MS. ACOSTA'S OCCUPATIONAL DISEASE CLAIM

A. The Elements of Res Judicata Are Satisfied

Ms. Acosta advances several challenges to the Commission's res judicata evaluation. Respondents submit that the Commission appropriately dismissed Ms. Acosta's occupational disease claim under this legal doctrine.

The Utah Supreme Court has delineated the requirements for the application of claim preclusion as follows:

{19} The doctrine of res judicata embraces two distinct branches: claim preclusion and issue preclusion. Claim preclusion involves the same parties or their privies and also the same cause of action, "and this precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action." . . .

{20} In order for claim preclusion to bar a subsequent cause of action, a plaintiff must satisfy three requirements:

First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Macris & Assoc. v. Neways, Inc., 2000 UT 93, ¶¶19-20, 16 P.3d 1214.

The parties do not dispute that the first requirement of this doctrine (same parties) and the third element (final judgment on the merits) are satisfied. Indeed, both cases involve the same parties, and the first action resulted in a final judgment, following several appeals, on the merits. The issue in this case surrounds the second element of this doctrine, i.e., whether the claim presented in the subsequent action and adjudicated in the ensuing proceeding are the same claim presented in the first action and, even if it was not presented in the first action, whether it could have and should have been presented in the earlier proceeding. See State in the Interest of J.J.T., 877 P.2d 161, 164 (Utah Ct. App. 1994).

With regard to the first part of the second requirement, there is no question that the occupational disease claim was not “presented in the first suit.” It was not alleged in the first action by Ms. Acosta. Rather, the legal issues to be decided are: (1) whether the occupational disease claim is the “same claim” as that raised in the first action; (2) whether the occupational disease claim is one that “*could have* been raised” in the first action; and, (3) whether the occupational disease claim is one that “*should have* been raised” in the first action. If each of these are answered in the affirmative, Ms. Acosta’s additional claim is barred under the doctrine of res judicata.

1. The Former and Subsequent Action Raise the Same Claim.

The “same claim” requirement has been addressed in numerous appellate court cases. Utah’s Courts have stated that the claim, demand, or cause of action in the present suit must be identical to the one brought in the prior suit. See Macris, 2000 UT 93, ¶19; Schaer v. State, 657 P.2d 1337, 1340-41 (Utah 1983).

In defining the term “cause of action” the Utah Supreme Court has focused on the identity of facts and evidence. Moreover, Utah’s Courts have held that claims that are based upon the same subject matter but different legal theories constitute the “same claim” for purposes of res judicata. For instance, in Macris, the Court defined “cause of action” as follows:

In identifying whether claims are identical for res judicata purposes, this court has focused on whether “the two causes of action rest on a different state of facts and evidence of a different kind or character is necessary to sustain the two causes of action.” Therefore, even if a plaintiff is aware of the factual basis of a suit at the filing of another suit, he or she is not obligated to bring all claims together if there is no identity of facts and evidence between two claims.

Macris at ¶27.

Similarly, in Gossner v. Dairymen Assocs., 611 P.2d 713 (Utah 1980) the Supreme Court stated:

A precise definition of “cause of action” as it relates to res judicata has never been agreed on. With the abandonment of

strict common law pleading and the move to broader, permissive pleading rules, the scope of a given cause of action has been expanded in order to perpetuate the underlying purpose of the doctrine -- to regard as resolved all matters which were or could have been raised. It is often said that both disputes must relate to the same subject matter, and draw on the same underlying factual questions and evidentiary foundation. Where the foregoing are present, it is generally regarded as inconsequential that the respective claims are different as to form or theory of recovery.

Id. at 719. (J. Hall Dissenting)

The Utah's Court of Appeals recently held that Utah law looks to "the aggregate of operative facts, . . . the situation or state of facts which entitles a party to sustain an action' to determine whether two suits stem from the same cause of action." See Massey, 2004 UT App n.4. (citation omitted); American Estate Management v. International Inv. & Dev. Corp., 1999 UT App 232, ¶¶9-11, 986 P.2d 765.

In American Estate, like the present action, the plaintiff originally claimed title based upon one legal theory -- breach of contract. He later claimed title based upon another legal theory -- adverse possession. The Court stated that these two actions raise the same claim, although under two different legal guises. See id. at ¶11.

Ms. Acosta's most recent occupational disease claim meets the same claim requirement. Like the first action, the present s claim relates to the

same subject matter or legal right -- Ms. Acosta's entitlement to workers' compensation medical and disability benefits as a part of her work at Salt Lake Regional (i.e., Utah Code Ann. § 34A-2-410 et seq.). Like the first action, the present claim entails the same injury to her low back and requests entitlement to the identical medical expenses for the same low back condition¹. Although the occupational disease claim alleges exposure from December 1980 to December 20, 1998, this new theory alleges injury during the same basic period of employment --December 20, 1998.²

¹ See Rogers v. Kunja Knitting Mills, U.S.A., 520 S.E.2d 815 (S.C. Ct. App. 1999). In Rogers, the court focused on whether the claims alleged the same injury. Because they did not, res judicata was denied.

² In his treatise, Friedenthal notes that, under the same evidence test, it is not necessary that the evidence be absolutely identical, but merely that a substantial part of the facts be proved under each claim to be the same. See Friedenthal, Kane and Miller, Civil Procedure § 14.4, at 646 (3d ed. 1999). That treatise indicates that "a transaction or series of closely connected transactions is the basic unit of litigation, regardless of the variations in the legal theories, primary rights, grounds, evidence or requested remedies." Modern trends show courts applying a same-transaction test, looking to "a natural grouping or common nucleus of operative facts". Id. Friedenthal notes that such a test comports with federal courts and in those states that have adopted comparable rules.

Friedenthal notes that "when a single injury can be traced to several wrongful acts, there is still only one cause of action. This is similar to the rule that a change in legal theory will not justify bringing a new action; each ground for relief must be presented in the original lawsuit." If a claimant argues that there were two causes of action, they "must show both that the separate acts were responsible for the alleged injuries and that the injuries themselves are distinguishable." Id. at 652-53.

Critically, Ms. Acosta claims that her back condition was asymptomatic prior to December 20, 1998. Thus, there was no cause of action for Ms. Acosta to assert – either cumulative trauma or occupational disease – until the occurrence of the events of December 20, 1998, events which have been previously litigated all the way to the Utah Supreme Court. See Weishaar v. Snap On Tools, 582 N.W.2d 177 (Iowa 1998) (noting that subsequently filed application alleging distinctly different injury dates of September 1987 and October 1988 did not constitute same claim as the April 29, 1986 event). Like the first action, the claim arises out of the same employment relationship and the same employment duties -- Ms. Acosta's nursing work at Salt Lake Regional. Like the first action, the present claim relies upon the same medical records and involves the same set of material facts. Moreover, the present claim centers upon the same evidentiary foundation, would require calling the same witnesses, would require similar proofs, and would be heard simultaneously at the same hearing with the same ALJ.

Ms. Acosta emphasizes that because the occupational disease claim and the former industrial accident claim are governed by two separate statutes, with different reporting requirements, apportionment requirements, and different elements for relief, etc., they fail to meet the

“same claim” requirement.³ There is no doubt that one of these new claims (the occupational disease claim) is governed in large part by the Occupational Disease Act. However, the occupational disease claim, like the other claim, is governed by the Worker’s Compensation Act. See Utah Code Ann. § 34A-3-102 (noting workers’ compensation act is incorporated into the occupational disease act). Moreover, these claims are governed by the Utah Administrative Procedures Act, Utah Administrative Code, and Utah Rules of Civil Procedure.

Such is not the case as noted by Professor Larson in his well-known treatise where the standards of proof in these cases are entirely different. See Arthur Larson, *Larson’s Worker’s Compensation Law*, §127.07[7] (2003) (I.e., legal issues in workers’ compensation proceeding are distinct from ones brought in Title VII action for sexual harassment; standards for determining employee status in workers’ compensation are different than those in tort civil suit). Both statutes, (section 34A-3-103 and section 34A-

³ Ms. Acosta’s reliance on SMP v. Kirkland, Inc., 843 P.2d 531 (Utah Ct. App. 1992) is misplaced. In that case, the Court held that res judicata did not bar the second action since the Commission did not have jurisdiction to decide that claim – which happened to be a contract matter. The fact that the claims arose from different statutes with different requirements was not a relevant consideration in the Court’s analysis. In other words, the contract action “could not have been brought” in that tribunal, so res judicata did not apply. Accordingly, her citation to this authority is inapposite.

2-401) require the same basic elementary proof -- that the injury or disease “arise out of and in the course of employment” as well as proof of medical and legal causation. They have the same “preponderance of evidence” standard. They both define employee status similarly and rely upon the same threshold case law (i.e., Allen v. Industrial Comm’n). Therefore, contrary to Ms. Acosta’s assertion, the degrees of proof are not sufficiently different to prohibit the same claim requirement.

The Restatement (Second) of Judgments §§ 24cmt. B (1982) states on this point:

Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held to [be] precluded. But the opposite does not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series.

Id. Utah’s Tenth Circuit has adopted the Restatement’s “transactional” approach in assessing the identity of claims. See Massey, 2004 UT app 27, ¶11 (noting Utah’s federal law approach is similar to Utah state law approach).

Moreover, Utah’s appellate courts have noted disfavor against

fragmented litigation. For instance, in American Estate the Court held that “a claimant may not pursue a claim . . . through piecemeal litigation, offering one legal theory to the court while holding others in reserve for future litigation should the first prove unsuccessful.” American Estate 1999 UT App 232, ¶14. In Wheadon v. Pearson, 376 P.2d 946 (Utah 1962), the Supreme Court similarly held that:

In such case the courts hold that parties should litigate their entire claim, demand and cause of action, and every part, issue and ground thereof, and if one of the parties fails to raise any point or issue or to litigate any part of his claim, demand or cause of action and the matter goes to final judgment, such party may not again litigate that claim, demand or cause of action or any issue, point or part thereof which he could have but failed to litigate in the former action.

. . . .

Policy would seem to indicate that when a plaintiff has once attempted to obtain his entire relief, based upon his entire claim, then the matter should be laid at rest. He should be denied a second attempt at substantially the same objective under a different guise.

Id. at 947-48. In Wheadon, the Court held that the claimant could not adjudicate his right to a right-of-way under a prescriptive easement theory in the first action and later claim the theory of implied easement in the second action.

The well-known hornbook by Friedenthal, Kane and Miller also subscribes to this position. It provides that res judicata is divided into two sections, “merger” and “bar”.

Merger applies when a claimant has prevailed; bar applies when the claimant has lost. When a claimant wins a judgment, all possible grounds for the cause of action are said to be merged into the judgment and are not available for further litigation. A party who loses the first suit is said to be barred by the adverse judgment from ever raising the same cause of action again, even if he can present new grounds for recovery.

. . . .

Prior litigation ends litigation, not only 'as to every ground of recovery that was actually presented in the action, but also as to every ground which might have been presented.' . . . The preclusive breadth of the doctrine means that a judgment concludes the entire cause of action, which may encompass separate component claims.

Friedenthal, Kane and Miller, Civil Procedure § 14.1, 14.3, at 627, 635 (3d ed. 1999).

Because Ms. Acosta's later claim litigates the same subject matter as the first action, simply under a different theory of relief, *res judicata* applies.

2. Ms. Acosta "Could Have" Raised the Occupational Disease Claim in the First Action.

The Labor Commission was also correct in concluding that Ms. Acosta's subsequent claim is one that "could have" been raised in the first action. The Commission stated on this point:

Commission practice and custom allow injured workers to claim benefits under alternative theories of accidental injury and occupational disease. Thus, Ms. Acosta "could have" raised her occupational disease [and cumulative trauma] claim in the earlier proceeding.

R. at 141.

Section 34A-2-801 of the Utah Code provides that an employee may contest the compensability of an industrial accident or occupational disease by filing an Application for Hearing with the Division of Adjudication of the Utah Labor Commission. See Utah Code Ann. § 34A-2-801. Rule 602-2-1 of the Utah Administrative Procedures Act also provides:

adjudicative proceedings for worker's compensation and occupational disease claims may be commenced by the injured worker or dependent filing a request for agency action with the Commission.

Utah Admin. Proc. Act R601-2-1.A.(2002). Moreover, Rule 18 of the Utah Rules of Civil Procedure states that a party may join “either as independent or as alternative claims as many claims either legal or equitable or both as he may have against the opposing party.” Utah R. Civ. P. 18.

This is certainly not a case where Ms. Acosta was jurisdictionally barred from raising this additional theory in her first action, see Nebeker v. State Tax Comm'n, 2001 UT 74, ¶23, nor is it a situation where her claim was not yet ripe for review. See Macris, 2000 UT 93, ¶¶ 24, 26 (indicating that one need only include claims in a suit for res judicata purposes if the plaintiff was aware of the facts upon which the later claims were based at the time of the first suit was filed). Ms. Acosta had the right to raise this occupational disease claim, there being sufficient facts to do so, but for

whatever reason did not. Accordingly, the Commission was correct in holding that she “could have” raised this claim in her first action.

Ms. Acosta argues that she “could not” have raised an occupational disease theory in her first action since Labor Commission Application for Hearing Form 001 in March of 1999 did not permit both industrial accident and occupational disease claims to be simultaneously pled. This argument lacks merit.

Although Labor Commission forms have since been revised in July of 2001 to include one Application for Hearing, Form 001, for filing both types of claims, at the time Ms. Acosta filed her first action there were two forms in existence at the Commission which allowed claims to be filed as occupational disease claims and/or industrial accident claims. Form 026 - Occupational Disease Claim of Employee – was used for occupational disease filings. Form 001 - Application for Hearing – was used for industrial accident claims. Contrary to Ms. Acosta’s assertion, the Commission’s forms then and still do allow for alternative pleading. Ms. Acosta certainly “could have” filed her claim under either of these theories of relief.

3. Ms. Acosta “Should Have” Raised the Occupational Disease Claim in the First Action.

The Commission also correctly ruled that Ms. Acosta “should have”

raised this additional claim in her first action. The Commission's Order provides an accurate statement of Utah law on this point. It reads as follows:

The Commission therefore turns to the question of whether she should have raised the claim in the earlier proceeding.

In American Estate Management Corp v. International Investment and Development Corp., 986 P.2d 765, 768 (Utah App. 1999) . . . the Utah Court of Appeals has summarized the law in Utah and other jurisdictions on the question of whether a claim "should have" been raised in earlier proceedings:

Claim preclusion reflects the expectation that parties who are given the capacity to present their entire controversies shall in fact do so. If a party fails, purposely or negligently, to make good his cause of action by all proper means within his control, he will not afterward be permitted to deny the correctness of that determination, nor to relitigate the same matters between the same parties.

. . . .

Plaintiffs were not entitled to pursue their claim of ownership through piecemeal litigation, offering one legal theory to the court while holding others in reserve for future litigation should the first prove unsuccessful.

In this case, Ms. Acosta had the opportunity in the first adjudicative proceeding to present all theories she believe supported her claim for benefits. She is not entitled to pursue her claim for benefits "through piecemeal litigation, offering one theory to the court while holding others on reserve."

In light of the foregoing, the Commission concludes that Ms. Acosta should have presented her occupational disease [and cumulative trauma] theory during the first adjudicative proceeding. The Commission further concludes that all

necessary elements are established for dismissal of Ms. Acosta's occupational disease [and cumulative trauma] claim on the basis of claim preclusion.

R. at 141.

Ms. Acosta submits that the “should have” requirement is not met because neither the Occupational Disease Act nor the Workers Compensation Act requires a claimant to bring simultaneously both an occupational disease and an industrial injury claim. It is certainly true that these statutes do not mandate a claimant to bring actions under both statutory theories simultaneously. Such purview is not with the legislature. However, Utah's Courts, interpreting the common law doctrine of res judicata, require parties to bring claims arising from the same controversy or “operative facts”. Youren, 2004 UT App 33 at ¶ 3. Thus, if the same controversy would implicate different theories of relief for the same subject matter (i.e., workers' compensation benefits), a party must raise all theories in the first action or thereafter be barred under the doctrine of res judicata. This issue was discussed by the Court in American Estate Management which provides that when parties have the capacity to present their “entire controversies”, they “shall in fact do so” or be barred by the doctrine of res judicata.

Ms. Acosta also submits that the Commission erred in collapsing the

could have and should have requirements in to a single “could have requirement”. This argument also fails. Review of the Commission’s Order reveals that it accurately analyzed each of these requirements separately under the applicable law. See R. at 141. There was certainly no error by the Commission in this regard.

B. Liberal Construction Rules Do Not Apply Since Ms. Acosta was Represented By Apt Legal Counsel In Her Prior Case

Ms. Acosta also maintains that res judicata should not be applied in this case based upon the public policy of liberal construction of the workers’ compensation statute. Appellate courts have stated that the Worker’s Compensation Act “should be liberally construed and applied to provide coverage.” However, the Court has also stated that liberal construction rules should not abrogate the applicability of a fundamental legal doctrine such as res judicata. More importantly, Ms. Acosta was represented by astute legal counsel, Timothy Allen, in her prior industrial action. This is certainly not a case where Ms. Acosta acted *pro se* and, in effect, was unaware of other potential legal theories of relief. Accordingly, there is certainly no basis of any fundamental unfairness so as to justify the inapplicability of the doctrine of res judicata to the present case. Mr. Allen served as the Presiding ALJ at the Labor Commission for many years prior to his involvement in this case. With apportionment possible in this case

under an occupational disease theory (see Utah Code Ann. §34A-2-110), Mr. Allen could have reasonably decided to forego that particular theory for tactical reasons.

The Labor Commission accurately stated that, although the Commission should liberally construe workers' compensation laws in favor of compensability, the claim preclusion doctrine serves important public objectives.

Claim preclusion serves "vital public interests, including (1) fostering reliance on prior adjudications; (2) preventing inconsistent decisions; (3) relieving parties of the cost and vexation of multiple lawsuits; and (4) conserving judicial resources.

R. at 141-42 *citing* American Estate, 1999 UT App 232, ¶6.

The present action is not akin to Jacobs v. Teldyne, Inc., 529 N.E. 2d 1255 (Ohio 1998), cited by Ms. Acosta, where benefits were reopened when the claimant's temporary total disability conditioned materially worsened. Certainly, under the Commission's continuing jurisdiction, section 34A-2-420, U.C.A., an injured worker may reopen an accepted claim under certain circumstances for increased disability, without res judicata implications. See e.g., Kennecott Copper Corp. v. Industrial Comm'n, 19 Utah 2d 158, 427 P.2d 952 (1967). However, circumstances warranting reopening of Ms. Acosta's claim are not present here. Moreover,

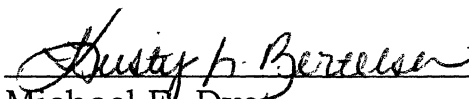
Respondents respectfully submit that the Labor Commission itself should be given some deference in deciding how liberally it may construe the Workers' Compensation Act of Utah.

CONCLUSION

Claim preclusion is premised on the principle that a controversy should be adjudicated only once. Indeed, Courts have routinely held that this doctrine is based upon the principle that the proper administration of justice is best served by limiting parties to one fair trial of an issue or cause. The Commission correctly ruled that Ms. Acosta's subsequent action is barred under the claim preclusion doctrine of res judicata. Ms. Acosta had full opportunity to raise this alternative theory in her former action, and she was represented by legal counsel who had served for many years as the Presiding Administrative Law Judge for the Labor Commission. Under these circumstances, affirmation of the Labor Commission's Order is appropriate.

DATED this 4th day of March, 2004.

BLACKBURN & STOLL, L.C.



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CERTIFICATE OF SERVICE

I certify that true and correct copies of the APPELLEE'S BRIEF was hand delivered and/or sent by first class mail on the 4th day of March, 2004, to:

Utah Court of Appeals Scott M. Matheson Courthouse 450 South State Street P.O. Box 140230 Salt Lake City, Utah 84114-0230	(8 copies, one w/ original signature)
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